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January 16, 2019

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: Written Ex Parte
CG Docket Nos. 18-152 & 02-278

Dear Ms. Dortch:

By counsel, Sirius XM Radio Inc. ("SiriusXM") submits this letter to emphasize the need for prompt Commission action clarifying the definition of an "automatic telephone dialing system" ("ATDS") under the Telephone Consumer Protection Act ("TCPA"). In Chairman Pai's words, clarification is needed so that the TCPA is "read ... to mean what it says" and no longer "spark[s] endless litigation, to the detriment of consumers and the legitimate businesses that want to communicate with them."[1] To ensure an ATDS definition that is consistent with the plain text of the statute, follows the guidance in *ACA International*,[2] and is uniform across the country, the Commission should adopt its decision in this docket before the January 28 deadline for *certiorari* petitions in *Marks v. Crunch San Diego LLC*.[3] The Commission should also file in support of

[1] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8077 (Dissenting Statement of Commissioner Ajit Pai).

[2] *See, e.g.*, Comments of Sirius XM Radio Inc., CG Docket Nos. 18-152 & 02-278 (filed June 13, 2018) ("SiriusXM Comments"); Reply Comments of Sirius XM Radio Inc., CG Docket Nos. 18-152 & 02-278 (filed June 28, 2018) ("SiriusXM Reply Comments").

[3] 904 F.3d 1041 (9th Cir. 2018). *See also* Comments of Sirius XM Radio Inc., CG Docket Nos. 18-152 & 02-278 (filed Oct. 17, 2018) (explaining why the Commission should reject *Marks*'s overinclusive interpretation of the TCPA).

any such petitions, alongside the Solicitor General of the United States, to help ensure a consistent national framework.[4]

These actions are needed to confirm that, as used in the TCPA, the term ATDS includes only equipment that can generate and automatically dial random or sequential numbers, and only to the extent such equipment is configured to do so at the time the call is made. As SiriusXM has explained previously, this result is necessitated by *ACA International* and the TCPA's legislative history.[5] By acting quickly, the Commission can help eliminate uncertainty and once again place its autodialer rules on a sustainable, common-sense footing. Quick action also can help minimize the impact of the contrary interpretation propounded by the United States Court of Appeals for the Ninth Circuit in *Marks*. Because the Commission's interpretation will (at least) be entitled to *Chevron* deference, and because this construction is indisputably "reasonable," courts considering the ATDS definition going forward will be bound to apply the agency's view, even if a particular court might prefer a different outcome. Indeed, to the extent the Supreme Court decides to review *Marks*, an intervening Commission interpretation would compel reversal of the Ninth Circuit's overly broad approach.[6] This fact warrants expeditious action, particularly given the weight of authority favoring the D.C. Circuit's narrower view over the Ninth Circuit's.[7]

Ideally, the Commission would release a decision narrowing the ATDS definition well before the January 28 *certiorari* deadline in *Marks*, so that any petitioners seeking *certiorari* could cite to the contradiction between the agency's view and the Ninth Circuit's. Because *Marks* relied in part on the lack of any definitive Commission ruling on the definition of autodialer after *ACA International*,[8] the speed with which the Commission adopts a revised

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[4] The Solicitor General is entitled to file briefs urging grant or denial of pending *certiorari* petitions even in cases to which the federal government is not a party, and has done so on many occasions. *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Royal v. Murphy*, No. 17-1107 (Mar. 2018) (urging grant of *certiorari* petition); Brief for the United States as *Amicus Curiae* in Support of Petitioners, *Reichle v. Howards*, No. 11-262 (Sept. 2011) (same); Brief for the United States as *Amicus Curiae* in Support of Petitioners, *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (Feb. 2008) (same).

[5] *See* SiriusXM Comments; SiriusXM Reply Comments.

[6] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (affording deference to agency interpretation notwithstanding prior contrary interpretation by court of appeals).

[7] *See Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3rd Cir. 2018) (adopting a narrow ATDS definition in light of *ACA International*); *King v. Time Warner Cable Inc.*, 894 F.3d 473 (2nd Cir. 2018) (agreeing with the D.C. Circuit about a more narrow ATDS definition).

[8] *Marks*, 904 F.3d at 1049-50 ("Because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS … we must begin anew to consider the definition of ATDS under the TCPA.").

ATDS definition may impact the likelihood that the Supreme Court reviews that decision and resolves the split between the Circuits. Prompt Commission action can fill the gap.

Whether or not the Commission acts before the *Marks certiorari* deadline, it can and should itself support any *certiorari* petitions that are filed. In particular, the Commission should, with the Solicitor General, weigh in as an *amicus curiae* supporting *certiorari* and encourage the Court either to (1) grant *certiorari*, vacate and remand the *Marks* decision in light of the Commission's action or (2) grant *certiorari* to resolve the circuit split and provide much needed clarity and finality to the ATDS definition. To this end, SiriusXM underscores that the Commission is free to set forth its views on the ATDS definition in an *amicus* filing *regardless* of whether the agency has formally adopted the position advanced in that filing. As numerous courts have held, an agency's brief (*amicus* or otherwise) setting forth a statutory construction that the agency has not formally adopted is nevertheless "entitled to respect" to the extent it is persuasive.[9] Moreover, the Solicitor General's office often expresses its views on whether the Court should review decisions even when the federal government is not a party to the underlying case.[10] Given the existing circuit split, the *Marks* litigation warrants such involvement.

SiriusXM thanks the Commission for its continued attention to this important issue. By moving quickly, the Commission may help to finally resolve the decades of uncertainty and litigation surrounding the ATDS definition.

Please do not hesitate to contact the undersigned with any questions.

Sincerely,

/s/ Bryan N. Tramont
Bryan N. Tramont
Jennifer B. Tatel
Joshua M. Bercu

[9] *See, e.g.*, *Christensen v. Harris County*, 529 U.S. 576 (2000); *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 411 (2d Cir. 2005).

[10] *See supra* note 4.